UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	:	Chapter 11
In re:	:	Case Nos. 00-B-41065 (SMB)
	:	through 00-B-41196 (SMB)
RANDALL'S ISLAND FAMILY GOLF	:	
CENTERS, INC., et al.,	:	(Jointly Administered)
	:	
Debtors.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER DIRECTING THE RETURN OF BID DEPOSIT

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This Memorandum of Law is respectfully submitted in support of the motion by Gary Gelman ("Gelman") for an order directing the law firm of Golenbock, Eiseman, Assor & Bell (the "Golenbock firm"), the attorneys for the Debtors, return to Gelman, from its escrow account, the deposit in the amount of $100,000 (the "$100,000 Deposit"), with interest, which Gelman delivered to the Golenbock firm, as escrow agent, in connection with a January 12, 2001 Solicitation of Bids for certain property of the Debtors, and to pay Gelman's attorneys fees.

There is no legal or factual basis for the Golenbock firm's refusal to return Gelman's money. Indeed, the Golenbock firm rejected Gelman's offer to bid, and it never sent Gelman a notice of default or forfeiture. The Golenbock firm, nevertheless, refuses to return the $100,000 Deposit. In so doing, the Golenbock firm has violated its fiduciary duties as escrow agent, ignored the procedures set forth in the Solicitation of Bids, and disregarded fundamental fairness and due process.

Gelman accordingly needs the Court's assistance to remedy the Golenbock firm's unilateral misconduct and to reverse its misappropriation of Gelman's money under the auspices of the Bankruptcy Court's Solicitation of Bids. The Golenbock firm accepted the $100,000 Deposit as a fiduciary and held said funds in escrow. The $100,000 Deposit is specific property belonging to Gelman; it is not a part of the Debtors' estate. Gelman is entitled to the return of his money that the Golenbock firm received in trust.

The facts establishing that Gelman's $100,000 Deposit should be returned to him are set forth in the Affidavit of Gary Gelman, sworn to March 20, 2001, and the Affidavit of Mark R. Kook, sworn to March 23, 2001. Those facts establish that:

(i) Gelman responded to the Debtor's Solicitation of Bids by delivering an offer to bid with respect to a golf driving range in Farmingdale, New York, and the $100,000 Deposit.

(ii) The Golenbock firm rejected Gelman's offer, and responded with a counter-offer that inserted "modifications", "corrections" and "additions" to the terms and conditions of Gelman's offer.

(iii) Gelman did not consent to the counter-offer, did not agree to the "modifications", "corrections" and "additions", and did not execute or deliver an acceptance of the new proposal.

(iv) Nevertheless, the Golenbock firm, without advising Gelman, unilaterally deemed Gelman to have accepted the counter-offer, and, again without advising Gelman, apparently submitted Gelman's "acceptance" at the Bankruptcy Court Auction on February 9, 2001.

(v) When he learned that the Golenbock firm had not only submitted his "modified" offer to the Auction, but also designated him as the Back-Up Bidder, Gelman, through his attorneys, advised the Golenbock firm that his initial offer had been withdrawn.

(vi) The Golenbock firm responded by declaring that Gelman's initial offer was irrevocable, regardless of its own rejection of that offer.

(vii) Then, after declaring that Gelman's offer was "irrevocable", the Golenbock firm unilaterally deemed Gelman to be in default by virtue of having withdrawn his bid!

(viii) And, the Golenbock firm never sent any notice to Gelman that he was in default or that he was forfeiting the $100,000 Deposit.

(ix) Indeed, the Golenbock firm never even bothered to follow the procedures set forth in the Solicitation: (i) it apparently failed to obtain an order of this Court designating a Successful Bidder for the Skydrive property, (ii) it failed to schedule a closing for the sale of the Skydrive property, and (iii) it failed to give Gelman notice of a closing.

The Solicitation provides that the Golenbock firm is liable "for willful misconduct, gross negligence, or bad faith". The facts establish that the Golenbock firm is liable on all grounds. Accordingly, the Court should order the Golenbock firm to return Gelman's $100,000 Deposit, with interest, and to pay Gelman's attorney fees.

The facts are set forth in more detail below as they relate to the Points of Law.

Argument

POINT I

THE GOLENBOCK FIRM REJECTED GELMAN'S OFFER AND COULD NOT UNILATERALLY "MODIFY", "CORRECT" OR "ADD TO" THE OFFER

It is black letter law that an offeree cannot unilaterally change the terms of an offer and thereby bind the offeree to the altered offer.

It is also a fundamental principle of contract law that there can be no agreement with respect to the sale of real estate unless there is first a mutually acceptable writing signed and delivered by both parties.

The Golenbock firm ignored these basic legal principles: the firm unilaterally "modified" Gelman's offer; and then, without advising Gelman, the firm submitted the "modified" offer to the Auction

as an "irrevocable bid." The Golenbock firm's actions were contrary to law and did not create an agreement that bound or obligated Gelman in any respect.

Gelman's Offer

On February 5, 2001, Gelman delivered an offer to bid on the Skydrive driving range, together with the $100,000 Deposit, to the Golenbock firm. (See Kook Aff. Exh. 3.)

The Golenbock Firm's Rejection of Gelman's Offer and Counter-Offer

The Golenbock firm rejected Gelman's offer. On February 7, 2001, the Golenbock firm sent Gelman a letter that rejected Gelman's offer and, instead, sought unilaterally to change the terms and conditions of his offer. (See Kook Aff. Exh. 4.)

In fact, Gelman's offer did not satisfy the requirements of the Solicitation even to be considered as a "Qualified Bid" that could be submitted at the Auction. The Golenbock firm stated in its February 7 letter that the "additions and/or corrections" that it was inserting upon the terms and conditions of Gelman's offer "are necessary" in order for his offer to be a "qualified bid". Again, as set forth in the Solicitation (see Kook Aff. Exh. 2, at ¶¶4-6), only "Qualified bids" could be submitted at the Auction.

The Golenbock firm also stated in its February 7 letter that if they had "not heard from you prior to 5:00 p.m. E.S.T. on Thursday, February 8, 2001, we will assume that the modifications and/or additions are acceptable to you, and your bid will be deemed modified accordingly."

However, neither the debtors, the Golenbock law firm nor Rich had the right, under the Solicitation or, indeed, under any precedent, to change unilaterally the terms and conditions of Gelman's offer. The Solicitation, at ¶19, gives the Debtors the right to reject any bid that does not conform with the Solicitation's bidding procedures. The Solicitation does not give the Debtors, or the Golenbock firm, any right to unilaterally "modify", "correct" or "add to" an offer.

Further, Gelman did not have any obligation, under the Solicitation or any other authority, to respond to the Golenbock firm's rejection and counter-offer.

In all events, despite the absence of any authority to do so, the Golenbock firm apparently submitted Gelman's offer -- as unilaterally "modified" and "corrected" -- at the Auction on February 9.

When he learned, on February 15, 2001, that the Golenbock firm had submitted his "corrected" offer at the auction, and that the bid was apparently the Back-up Bid, Gelman directed that the Golenbock firm be advised that his offer should not have been submitted. The Golenbock firm's response was to state, in a fax, "Per the bidding rules, Gelman is not permitted to withdraw his offer." (See Kook Aff. Exh. 5.)

There are no such "bidding rules". Again, Gelman's offer was not accepted; and the Golenbock firm had no authority to make unilateral "corrections", "modifications" or "additions" to his offer. The Golenbock firm had no right to submit Gelman's offer to bid at the February 9 Auction.

There Must Be a Written Contract Signed by Both Parties

The sale of the Skydrive property required a written contract, containing all material terms, signed and delivered by the seller and the purchaser. There cannot be an oral agreement to sell real property. See New York General Obligation Law §5-703.

There was no contract here. Gelman's offer did not create a binding contract. Rather, "a bid is nothing more than an offer. No legal rights are created until the offer has been accepted." S.S.I. Investors Ltd. v. Korea Tungsten Mining Co., Ltd., 80 A.D.2d 155, 438 N.Y.S.2d 96, 101 (1st Dep't 1981).

The Golenbock Firm's Rejection and Counter-Offer Did Not Create a Contract

Moreover, the Golenbock firm did not accept Gelman's offer. As the District Court stated in International Paper Co. v. Sunwyn, 966 F.Supp. 246 (S.D.N.Y. 1997), "An acceptance, however, that is conditioned on terms at variance with those in the offer operates as a counteroffer and terminates the

original offer." Id. at 254. See Gram v. Mutual Life Ins. Co. of New York, 300 N.Y. 375, 382 (1950) ("It is a fundamental rule of contract law that an acceptance must comply with the terms of the offer"); Kleinberg v. Ambassador Associates, 103 A.D.2d 347, 480 N.Y.S.2d 210, 211 (1st Dep't 1984) ("The intention to accept must be manifested unequivocally (Williston on Contracts, 3rd Ed. §72), the acceptance must be of the terms stated in the offer; and if the offeree responds by adding provisions or making a counter proposal, the offer is deemed rejected") (emphasis added), aff'd, 64 N.Y.2d 733, 485 N.Y.S.2d 748 (1984); Estate of Roland Meledandri, 108 Misc.2d 972, 437 N.Y.S.2d 996, 999 (Surr. Ct. N.Y. Co. 1981) ("Counter-offers or conditional offers, if the conditions are not accepted in writing signed by the party to be charged, do not constitute a binding contract").

Gelman Was Not Required
To Accept The Counter-Offer

Further, Gelman was required only "to hold his offer open according to its terms." Silverstein v. United Cerebral Palsy Association of Westchester County, Inc., 17 A.D.2d 160, 232 N.Y.S.2d 968, 971 (1st Dep't 1962). The Golenbock firm was not free to insert its "corrections", "modifications" and "additions" onto Gelman's offer. Rather, as the Silverstein court noted, "when an offeree decides to accept the irrevocable offer, he must act in accordance with its terms. (See 1 Williston on Contracts (3rd Ed.), §61-D.)." 232 N.Y.S.2d at 972. See Greenberg v. Pine Hollow Standardbred Sale & Management Corp., 94 A.D.2d 836, 463 N.Y.S.2d 108, 110 (3rd Dep't 1983) (one party cannot make a "unilateral modification" to a contract).

These are basic principles of contract law, which the Golenbock firm is certainly aware of. The Golenbock firm could not unilaterally create a contract, binding Gelman irrevocably to buy the Skydrive property, by rejecting his offer and replacing it with a counter-offer that "modified", "corrected" and "added to" the offer.

These principles are fundamental, and there is no good faith basis for the Golenbock firm's to have ignored them. The $100,000 Deposit should be returned.

POINT II

THE GOLENBOCK FIRM VIOLATED THE SOLICITATION OF BID PROCEDURES AND GELMAN'S RIGHT TO NOTICE AND FUNDAMENTAL DUE PROCESS

Further, even assuming that the Golenbock firm had some right to submit Gelman's "modified" offer at the Auction, there can be no good faith dispute that the Golenbock firm in all events violated the Solicitation of Bid's procedures and treated Gelman as though he was a disinterested bystander, with no right to any notice of any event -- including the Golenbock firm's unilateral determination to call a forfeiture of Gelman's $100,000 Deposit.

Indeed, the Golenbock firm cannot dispute that it never sent Gelman a notice:

(i) as to the status of his bid;

(ii) that a closing was scheduled upon his bid;

(iii) that Gelman would forfeit the $100,000 if he did not attend the closing; or

(iv) that the Golenbock firm had decided to default Gelman.

The Golenbock Firm's Failure to
Follow the Solicitation of Bid Procedures

Moreover, the Solicitation (at ¶17) states that "formal acceptance of a Bid will not occur unless and until the Court enters an order approving and authorizing the Debtors to consummate the transaction with the Successful Bidder(s) or their respective assignee." To our knowledge, the Court has not entered an Order designating Gelman, or anyone else, as the Successful Bidder with respect to the Skydrive property. The Golenbock has refused even to acknowledge whether or not such an order exists.

The Golenbock firm has taken the position that a Court order was not needed for Gelman to become the Successful Bidder. Rather, the Golenbock firm asserts that, pursuant to ¶21 of the Solicitation, Gelman, as the second highest bidder, was "deemed the Successful Bidder without further order of the Court" when the Successful Bidder defaulted. (See Kook Aff. Exh. 6.)

However, there could not have been an initial "Successful Bidder" without the Court first (i) approving the transaction pursuant to ¶14 of the Solicitation and (ii) issuing an order pursuant to ¶17 of the Solicitation accepting the Successful Bidder with respect to the Skydrive property.

The Failure To
Schedule a Closing

In addition, the provisions of ¶21 of the Solicitation concerning a "Back-up Bid" may be invoked only after a "Successful Bidder" had defaulted by failing to appear at a closing. Here, again, the Golenbock firm has failed to advise us whether a closing had ever been scheduled upon the Skydrive property. And, certainly, a closing has never been scheduled, to Gelman's or our knowledge, with respect to any offer by Gelman of the Skydrive property.

Further, under ¶21 of the Solicitation, if a Back-up Bid has properly been "deemed the Successful Bidder", then the parties "shall proceed to Closing no later than ten (10) days following the date of default by the original successful Bidder." Again, the Golenbock firm never sent Gelman notice of any such default or closing, and to our knowledge such a closing was never even scheduled.

The failure of the Golenbock firm to schedule a closing is dispositive of Gelman's right to the return of the $100,000 Deposit -- assuming, that is, that the Golenbock firm had any right in the first instance to submit Gelman's bid at the Auction as unilaterally "corrected" and "modified". Thus, as set forth in the Solicitation (at ¶5), an offer is irrevocable only "until the earlier of (i) the Closing or (ii) thirty (30) days following the last date of the Auction." Consequently, even assuming that the Golenbock firm had authority to submit Gelman's offer at the Auction, its failure to schedule a closing means that Gelman was free to revoke his bid, under any circumstance, by March 11, 2001, thirty days after the February 9 Auction.

Finally, the Solicitation explicitly states (e.g., at ¶21), that a Successful Bidder forfeits its deposit only when it fails to close." A Successful Bidder cannot be deemed to have "fail[ed] to close" when he has not been accorded basic due process by being given notice that a closing has been scheduled.

The Golenbock firm, once again, failed to abide by the most basic principles of law.

For example, the Solicitation did not set a date for the Closing. Indeed, if Gelman was required to close by virtue of the Golenbock firm's deeming him to be the successful Back-up Bidder upon the default of the initial Successful Bidder, then Gelman had no way of knowing (i) when the first Successful Bidder defaulted, (ii) when the Golenbock firm annointed him as the new Successful Bidder, or (iii) when the Closing was to occur.

And Gelman remained in the dark because the Golenbock firm did not give him notice of any one of those events.

Moreover, the law is clear that even when some notice is provided, a forfeiture still will not be permitted unless the notice is clear, unambiguous, and fully apprises the defaulting party of all the pertinent events and rights. The holding of the District Court in Lurzer GMBH v. American Showcase, Inc., 75 F.Supp.2d 98 (S.D.N.Y. 1998), is instructive:

> [W]hen a party seeks the draconian remedy of forfeiture based on another party's failure to respond to a notice of default, the notice in question will

> be scrutinized carefully and any inadequacy, no matter how trivial, will defeat the claim. *See, e.g.*, Siegel v. Kentucky Fried Chicken, 67 N.Y.2d 792, 501 N.Y.S.2d 317, 492 N.E.2d 390 (Ct.App.1986); Chinatown Apartments, Inc. v. Lam, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 (1980); Filmtrucks, Inc. v. Express Industries and Terminal Corp., 127 A.D.2d 509, 510, 511 N.Y.S.2d 862 (1st Dep't 1987). This is an expression of the broader principle that the law disfavors forfeiture and that "[i]n the construction of all contracts under which forfeitures are claimed, it is the duty of the court to interpret them strictly in order to avoid such a result." Lyon v. Hersey, 103 N.Y. 264, 270, 8 N.E. 518 (Ct.App.1886); *cf*. J.N.A. Realty Corp. v. Cross Bay Chelsea, 42 N.Y.2d 392, 397-399, 397 N.Y.S.2d 958, 960-961, 366 N.E.2d 1313, 1316.
>
> -- Id. at 102.

In this same regard, when a party seeks to make performance "time of the essence", that party must give the other party "clear, distinct and unequivocal" notice, and "must inform the other party that if he does not perform by that date he will be considered in default". Mohen v. Mooney, 162 A.D.2d 664, 557 N.Y.S.2d 108, 110 (2nd Dep't 1990) (citations omitted.)

Similarly, one party cannot place the other in default without first tendering its own performance. See Gargano v. Rubin, 200 A.D.2d 554, 606 N.Y.S.2d 314, 315 (2nd Dep't 1994).

Here, again, the Golenbock firm did not even schedule a closing.

Conclusion

The Golenbock firm was supposed to act as a fiduciary with respect to the $100,000 Deposit. The Golenbock firm clearly, and repeatedly, breached those duties.

Instead, the Golenbock firm simply manufactured its own set of rules as it went along, unilaterally deeming Gelman's bid to be amended, to be a Qualified Bid, to be the Successful Bid, and then to be in default, all in a matter of days, and all without any notice whatsoever to Gelman and without even a feigned attempt to abide by basic principles of fair notice and fair dealing.

Accordingly, based on the foregoing, it is respectfully submitted that the Court should enter an Order directing the Golenbock firm to return the $100,000 Deposit to Gary Gelman, with interest, and to pay Gelman's attorneys fees.

March 23, 2001

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